UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 09

TRADER JOE'S EAST INC., **Employer** and **TRADER JOE'S UNITED** **Petitioner.**	Case No. 09-RC-309216

POST-HEARING BRIEF OF EMPLOYER TRADER JOE'S EAST INC.

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I. INTRODUCTION

From the moment that Trader Joe's United ("Union") filed a petition to represent Crew at the Trader Joe's Louisville, Kentucky store ("Store" or "Louisville Store"), the Union, its agents, representatives, organizers, and supporters engaged in pervasive, coercive and intimidating conduct in an effort to win the election. Although the Union's threatening and unlawful tactics were successful, the Region should not permit the election to stand.

Based on the record and the arguments set forth below, the Regional Director should sustain Trader Joe's East Inc.'s ("Employer") objections and set aside the election. The Union, its agents, representatives, organizers, and supporters personally and publicly threatened eligible voters, utilized false and inflammatory racial appeals throughout the campaign, and cornered Crew while at work and performing their assigned duties on the morning of the election. The Employer has met its burden to establish both that the Union's conduct created an atmosphere of fear and coercion that interfered with the laboratory conditions necessary to conduct a free and fair election and created a general atmosphere of fear and reprisal that rendered a free election impossible.

Accordingly, the Regional Director must set aside the results of this flawed election and direct that a second election be conducted.

II. STATEMENT OF FACTS

A. Trader Joe's Operations

Trader Joe's is a specialty, neighborhood grocery store chain that strives to provide the best valued products to its customers. Tr. 56:257:6. In Louisville, Trader Joe's operates a grocery store, Store 628, and a wine shop, Store 625. Tr. 57:7-16. The grocery store and wine shop are physically in the same building but are separated by a partition in compliance with

Kentucky alcohol laws. Tr. 57:17-58:4. Individuals cannot access the wine shop from the grocery store and must enter each store through its main entrances. *Id*.

Craig Wood ("Wood") is the Captain of both stores. Tr. 56:2-7, 58:5-8. The Captain is akin to a store manager and is responsible for running and supporting the Store and being available to both customers and the Crew as much as possible. Tr. 58:10-13. Mates are akin to assistant store managers and support the Captain in running the Store, support the Crew in their duties, and "run teams, [the] customer experience team, product team, [and] keep [the] store running efficiently throughout the day. They also provide feedback [and] provide reviews." Tr. 58:17-22. Mates and the Captain are statutory supervisors. Tr. 58:23-59:2. Crew are statutory employees. They are responsible for supporting either the product team – which is focused on restocking the shelves and replenishing product – or the customer experience team – which is focused on registers and providing customers a great experience. Tr. 59:3-60:1.

B. The Union Begins Pattern of Intimidating Behavior During the Campaign

On December 20, 2022, the Union filed a petition seeking to represent Crew and Merchants[1] at the Louisville Store. Bd. Ex. O-1(b). That same day, the Union, through Crew Member Connor Hovey ("Hovey") tried to present the petition to Wood at the Store. Tr. 60:23-62:7. Although other Crew and Union supporters were present during the interaction between Wood and Hovey, only Hovey attempted to speak to or deal with Wood in connection with the presentation of the petition. Tr. 63:2-5.

Throughout the campaign, Hovey represented himself as the face of the Union and Crew understood him as such. On cross-examination, Hovey testified that he initiated contact with Trader Joe's United and he was the only Crew in that first meeting with Union Officer Maeg

[1] Merchants are the Trader Joe's "customer experience champions" – they have superior product knowledge and frequently interact with customers. The Employer does not currently employ any Merchants at the Store.

Yosef ("Yosef"). Tr. 145:10-14, 146:16-19. Following this, Hovey was the first person to contact many of the Crew at the Store about the union organizing efforts. Tr. 195:1-8, 237:16-25, 361:1-6. Additionally, Hovey posted on social media about the union, organized union events, and advertised the events via text message. Tr. 130:17-18, 195:1-8. Being that Trader Joe's United is an employee-created union without any offices or local officers, Hovey represented himself as the head of the Union at the Store, and the Union and Louisville Crew understood him as such. Tr. 116:14-18, 116:23-3, 161:22-25. Morgan Gillenwater ("Gillenwater") is another Crew Member who represented themselves and was perceived as a lead Union representative and organizer. Tr. 195:10-13. No other Union officers, officials, or business agents were at the Store during the critical period of the campaign. Tr. 120:12-13, 238:5-8.

The Union utilized coercive tactics to gain support for its organizing efforts. From the start, false claims from Union supporters that Store leadership was racist pervaded the Store. Around mid-December, Mate Drew Vondran discovered graffiti on one of the Store's "U-boats"[2] that read "Racist Mates And Captain." Er. Ex. 3; Tr. 487:15-18. Union supporters also made false claims during the critical period that Wood was racist, based in part on alleged prior staffing decisions he made, allegedly trying to "get rid of certain people" – i.e., African Americans and other minorities. Tr. 73:19-22, 75:10-22. During the critical period, Gillenwater even went as far to say that the Captain, Wood, was "white and racist and a republican and a Christian." Tr. 192:8-15.

The Union's coercive tactics were amplified on social media and through personal threats. Many Crew at the Store are members of a store Facebook group titled Trader Shift 628.

[2] A U-boat is a piece of rolling equipment the Store utilizes to hold the back stock of product in the back room. Tr. 77:8-15.

Tr. 227:11-18, 366:13-16; U. Ex. 1. Prior to the filing of the petition, Crew would utilize the group to trade shifts with coworkers. Tr. 228:19-21. During the Union's campaign, however, the Facebook group morphed into a forum filled with hostile conversations about unionization. Tr. 228:21-23. In the last days before the election, Crew Member Ruthie Knights ("Knights") posted on the Facebook group about her prior personal experience as a union member and her opinion on the current unionization efforts. Er. Ex. 5; Tr. 228:24-229:1. In response, Union organizer Gillenwater responded that Knights' stated position was "disheartening and dangerous" and that Knights "lacked empathy." Er. Ex. 5; Tr. 229:9-21. This response was seen by most of the Crew at the Store, as most are members of the Facebook group, and at least ten Crew approached Knights to comment that they had seen the post and asked if Knights was okay. Tr. 233:25-234:2, 250:10-16.

The following day, Knights reported Gillenwater's statement to Mate Travis Todd ("Todd"). Tr. 232:10-25; 313:3-11. Specifically, Knights informed him that she felt Gillenwater's response was threatening, that she did not feel safe, voluntarily provided a screenshot of the Facebook exchange, and asked Todd to adjust her work schedule to avoid leaving the Store at night at the time Gillenwater and other Union supporters worked. Tr. 233:9-17, 235:3-4. Knights previously worked a mix schedule of 11:00 a.m. to 7:00 p.m. or 2:00 p.m. to 10:00 p.m. Tr. 233:3-8. Due to Gillenwater's threatening Facebook response, Todd granted Knights' request and Knights solely worked the 11:00 a.m. to 7:00 p.m. shift for the following two weeks. *Id.*; Tr. 317:8-19.

Days before the election, Crew Member Rebecca Bex Verrill ("Verrill") was also subject to coercive text messages from Hovey about the Union. Tr. 188:3-12. Verrill, who had been close friends with Hovey prior to the organizing efforts, reached out to Hovey to express that she

valued their friendship and was open to hearing from him about the Union. *Id*. Rather than engaging in discourse about why he believed the Store should unionize, Hovey accused Verrill of "lying on [his] name," and stated that Verrill was untrustworthy, and that she had "put a very strong majority of peoples' jobs in jeopardy." Er. Ex. 2; Tr. 190:9-191:3. After receiving Hovey's aggressive text message, Verrill reported the interaction to Wood the next day because she felt scared and bullied. *Id*.; Tr. 69:9-12. Verrill voluntarily provided to Wood and Todd screenshots of the text message exchange and voluntarily provided a statement of the interaction. Tr. 70:20-71:4, 71:20-21, 72:12-14, 320:24-321:2; Er. Ex. 1.

The Union's pattern of intimidating behavior both in the Store and on social media created a general atmosphere of fear amongst the Crew. When Wood returned to the Store the week of the election following an extended absence Crew Members informed him that since the Union's campaign began, they felt intimidated, unsafe, and unwelcome. Tr. 67:1-7. Crew Members also adjusted their habits in the Store. Knights and other Crew Members that felt unsafe no longer parked in the back of the Store and, instead, chose to park in the front parking lot where there were more security cameras and used the buddy system when leaving work at night. Tr. 234:8-18. By the Union's conduct, Crew felt as though their position in the Store could be affected if the Union was voted in. Tr. 187:24-188:2.

C. Mere Hours Before Polls Opened, the Union Cornered Eligible Voters While on the Clock

The election was set to occur on January 25 and 26, 2023, from 12:00 p.m. to 6:00 p.m. each day, in the wine shop storage room. Bd. Ex. O-1(b). Leadership at the Louisville Store abided by extant Board law and refrained from engaging Crew in groups about the campaign or the upcoming vote during the 24-hour period before the polls opened. Tr. 393:22-24. Hovey and the Union's counsel, Seth Goldstein ("Goldstein"), on the other hand, addressed groups of

Crew at the Store while they were on the clock during this 24-hour period and were present for about 30 minutes. Tr. 122:5-10.

At around 10:30 a.m. on January 25, Hovey and Goldstein entered the wine shop despite the election's pre-hearing conference not starting for another hour in the storage room. Tr. 120:24-121:8, 122:18-24, 166:3-11; Er. Ex. 3. Verrill and Crew Member "Ariana" were working the registers in the front of the wine shop at that time. Tr. 168:12-169:1. Hovey and Goldstein walked through the wine shop and, on their way out, Goldstein turned toward Verrill and – without provocation – shouted "Solidarity!" at her and thrust his clenched fist above his head. Tr. 170:13-14; Er. Ex. 3. When Verrill responded that she was not a part of the union group, Goldstein responded "Oh, you're one of those" and exited the wine shop. Tr. 170:14-16. Goldstein's exclamation of support for the Union was loud enough for both Ariana and the customer Verrill was assisting at that time to hear. Tr. 171:14-172:11. Further, because Verrill was in the midst of a customer transaction, she could not leave the area to avoid the interaction. Tr. 172:14-19. After her wine shop shift, Verrill reported the incident to Mate Keith Akers; Goldstein's aggressive exclamation made her feel like she was not doing the right thing at Trader Joe's. Tr. 187:6-21.

Right after shouting "Solidarity!" at Verrill, Hovey and Goldstein walked outside and entered the grocery store. Tr. 121:4-11. While there, Hovey and Goldstein met with groups of Crew while they were on the clock and working their assigned tasks. Tr. 125:14-19. Crew Member Ila Wrucke ("Wrucke") worked from 6:00 a.m. to 12:00 p.m. on January 25 on the product team along with a handful of other Crew. Tr. 255:18-23, 355:24-356:9, 356:17-20. While Wrucke was stocking groceries on the shelves with the rest of her team, she observed

Hovey and Goldstein walking around the grocery aisle of the Store and talking with groups of Crew who were on the close and at work.[3] Tr. 358:18-22.

Wrucke observed the interactions for about a minute before she walked to the back receiving room and reported this to Mate Christi Campbell ("Campbell"). Tr. 359:2-7, 392:19-23. Wrucke, visibly upset by what she just witnessed, told Campbell that Hovey and Goldstein were talking with Crew in the grocery store. Tr. 392:19-23. To investigate Wrucke's concern, Campbell walked out of the back receiving room and out onto the sales floor where she witnessed at least four Crew Members gathered around Hovey and Goldstein. Tr. 393:6-17. Shortly after observing this, Campbell wrote a statement documenting that she saw Hovey and "the man surrounded by at least 4 [Crew Members] talking" and that all the Crew Members "were on the clock and had been tasked with working that section" of the grocery store. Tr. 395:13-19; Er. Ex. 6. Hovey testified that him and Goldstein were in grocery aisle with the group of Crew for at least two to three minutes. Tr. 126:24-25.

D. The Election

The polls opened at 12 Noon until 6:00 p.m. on both January 25 and 26. The tally of ballots conducted at the close of voting on January 26 shows that out of 106 eligible voters, 48 votes were cast for the Union, 36 votes were cast for the Employer, and there were 7 challenged ballots. Bd. Ex. O-1(b). On February 1, 2023, the Employer filed the objections to the election underlying the current proceedings. *Id*., Bd. Ex. O-1(a).

[3] Wrucke testified that at the time, she did not know the identity of Union's counsel and instead described him as "a middle-aged man in a suit" carrying a briefcase who she believed to be a representative of the Union. Tr. 357:1-11, 357:22-24. However, it is undisputed that Goldstein (and Hovey) were in both the grocery store and the wine shop the morning of the election.

III. ARGUMENT

A. Seth Goldstein's Testimony Should Be Given No Weight

1. The Employer's Offer of Proof is a Valid Sanction for Goldstein's Failure to Comply with a Valid Subpoena

On March 16, 2023, the Employer served on Union's counsel a valid subpoena *ad testificandum* for Goldstein to appear and testify regarding his conduct at the Store on the morning of January 25, the first day of the election. The Union petitioned to revoke the subpoena on a number of spurious bases. At the beginning of the first day of hearing testimony, Hearing Officer Moore denied the Union's petition to revoke. Tr. 18:15-16. Goldstein refused to appear. Tr. 54:21-22. Goldstein and the Union's counsel offered no valid justification for his noncompliance, as the collective-bargaining negotiations he needed to attend in Minneapolis, Minnesota were not scheduled to begin until the following day, March 21. Tr. 21:12-13.

In light of Goldstein's blatant disregard for the valid subpoena compelling his appearance, the Employer's counsel requested that Hearing Officer Moore, as a sanction for that conduct, draw an adverse inference for his failure to appear and accept an offer of proof with respect to Goldstein's conduct as substantive evidence. Tr. 112:2-7. Hearing Officer Moore granted the Employer's request to make the following offer of proof:

> If Mr. Goldstein had been here to testify, he would have testified to the fact that on the morning of January 25th, 2023, which was the first day of the election, he entered the Trader Joe's wine shop at about 10:30 a.m. with Connor Hovey.
>
> And after walking through the wine store for about 45 seconds, Mr. Hovey and Mr. Goldstein began to exist the wine shop through the doors that are next to the registers. And as he exited the – or as he began to exit the wine shop, he turned to crew member Bex, Rebecca Verrill, raised his first above his head, and shouted at her, 'Solidarity.'
>
> Bex – well, Bex will testify about what happened. Bex responded that she's not with them, or words to that effect, to which Mr. Goldstein replied, 'Oh, you're one of them.'

> That same day, Mr. Goldstein and Mr. Hovey were in the grocery store before the election began, and they were walking through the store, talking with crew members. And in particular, they were in the grocery aisle talking to a group of between three and five crew members while they were on the clock and at work as part of the product team. Those conversations took place in that work area for more than a minute.

Tr. 114:22-115:20.

When the hearing reconvened on March 30, Hearing Officer Moore ruled the Employer's offer of proof invalid because "the party representative who made the offer was speaking as to what a witness of the opposing party would testify to." Tr. 282:25-283:4. Over the Employer's objection, Hearing Officer Moore proceeded to call Goldstein as a witness as he was present at the hearing as Union's counsel. Tr. 279:6-7, 286:22-24. The Employer maintained

> that given Mr. Goldstein's failure to appear in response to a valid subpoena that was not revoked at the time he was required to appear [and] entitled the Employer to make that offer of proof, and it should remain on the record, and then any other negative adverse inferences from Mr. Goldstein's failure to appear should be applied.

Tr. 284:19-25.

The Board maintains the authority to impose appropriate sanctions to "maintain[] the integrity of the hearing process." *NLRB v. C. H. Sprague & Son, Co.*, 428 F.2d 938, 942 (1st Cir. 1970). In matters of subpoena noncompliance, the Board may impose a variety of evidentiary sanctions, "including permitting the party seeking production to use secondary evidence, precluding the noncomplying party from rebutting that evidence or cross-examining witnesses about it, and drawing adverse inferences against the noncomplying party." *McAllister Towing & Transportation Co., Inc.*, 341 NLRB 394, 396 (2004); *see also Rogan Bros. Sanitation, Inc.*, 362 NLRB 547, 549 fn. 9 (2015) (rejecting affidavits of respondent's witnesses after witnesses failed to comply with General Counsel's subpoena for their testimony); *United Brotherhood of Carpenters and Joiners of America*, 328 NLRB 788, 788 fn. 2 (1999) ("it is well

established that the failure of a witness to appear on behalf of a party for whom he/she would be expected to give favorable testimony may appropriately give rise to an inference that the witness's testimony would be unfavorable."). Such sanctions can be "imposed even when . . . the [requesting party] did not seek enforcement of the subpoenas." *Rogan Bros. Sanitation*, above. While a party may explain their reasons for noncompliance through a petition to revoke, it is well-established that "a party who simply ignores a subpoena pending a ruling on a petition to revoke does so at his or her peril." *McAllister Towing*, above, at 397.

The Hearing Officer improperly ruled that the Employer's offer of proof as to Goldstein's conduct the morning of the election was invalid. The offer of proof should be accepted as substantive evidence due to Goldstein's failure to appear pursuant to a valid subpoena, and the Regional Director should strike from the record in full Goldstein's belated hearing testimony on the third day of the hearing. The Employer's subpoena was validly issued, and Hearing Officer Moore denied the Union's petition to revoke. The Union consciously and intentionally failed to present Goldstein to testify in response to the valid subpoena.[4] As a result, the Employer was prejudiced by its inability to present its case and introduce evidence in the order in which it intended.

Goldstein's later appearance at the hearing does not rectify his noncompliance. The time for compliance was on the first day of the hearing when Hearing Officer Moore denied the Union's petition to revoke. A valid subpoena "is not an invitation to comply at a mutually convenient time" and the Regional Director should not permit the Union and Goldstein to choose when to comply with the subpoena without any repercussions. *McAllister Towing*, above, at 397.

[4] The Union's reasons for noncompliance should be disregarded, as Goldstein and his partner, Retu Singla, were the representatives who confirmed the hearing schedule which overlapped with the previously scheduled collective-bargaining sessions for the Trader Joe's Minneapolis store, despite knowing that Goldstein was a key participant in the events at issue in the underlying objections.

Moreover, Union's counsel did not even inform the Employer that Goldstein would be in attendance at the hearing, and instead learned through communications with the Hearing Officer. Accepting the offer of proof as substantive evidence and striking Goldstein's testimony is proportional to the noncompliance in this case and are appropriate sanctions consistent with the Board's authority.

Alternatively, if the Regional Director adopts Hearing Officer Moore's ruling that the Employer's offer of proof is invalid, the Regional Director, at a minimum, should give no weight to Goldstein's testimony on direct examination by the Hearing Officer, and the Regional Director should strike Goldstein's testimony on cross-examination by Union's counsel. *See IATSE Local 720*, 369 NLRB No. 34, slip op. at 1, fn. 2, and 7-8 (2020) (ALJ did not abuse discretion by, *inter alia*, striking respondent's witness's testimony "due to Respondent's deliberate refusal to comply with the General Counsel's subpoenas and [the ALJ's] Order granting in part and denying in part Respondent's Petition to Revoke.").

There must be some significant evidentiary sanction for Goldstein's failure to appear when compelled to do so pursuant to a valid subpoena. Otherwise, the Board's subpoenas become nothing more than suggestions to appear at a hearing or to produce documents. *See Keiler*, 316 NLRB 763, 769 (1995) ("A subpoena, whether designed to secure testimony or the production of relevant documents, is not a suggestion to appear and provide requested evidence when mutually convenient; neither is it 'an invitation to a game of hare and hounds, in which the witness must testify only if cornered at the end of the chase.'").

2. Goldstein Is Not a Credible Witness

If accepted, the Regional Director should not credit Goldstein's bizarre testimony. The Board has long recognized the factors the factfinder should consider in assessing witness credibility: the context of the witness' testimony, the witness' demeanor, the weight of the

respective evidence, established or admitted facts, inherent probabilities, and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 3339 NLRB 303, 305 (2003); *Daikicki Sushi*, 335 NLRB 622, 623 (2001), citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996). The factfinder may also consider corroboration and the relative reliability of conflicting witness testimony. *Precoat Metals*, 341 NLRB 1137, 1150 (2004) (lack of specific recollection, general denials, and comparative vagueness insufficient to rebut more detail testimony).

First, the Regional Director should conclude that Goldstein lacks credibility due to his blatant noncompliance with a valid subpoena seeking his testimony, as detailed above. Second, Goldstein's overall demeanor should be considered when assessing his credibility. When Employer's counsel was stating the Employer's position on Goldstein appearing at the hearing and testifying, Goldstein became hostile and combative during the discussion of whether he would be called to testify. *See* Tr. 284:13-286:19. Third, Goldstein's testimony was inconsistent with the facts already in the record. On direct examination by Hearing Officer Moore, Goldstein testified that he and Hovey only had brief conversations with Crew in the Store that did not last any length of time. Tr. 295:2-5. However, Hovey previously testified that when he was in the grocery store with Goldstein, they stopped to talk with Crew "about the upcoming vote and how exciting its going to be," surely an interaction that took some length of time. Tr. 150:13-20. Wrucke and Campbell both credibly testified that they witnessed interactions between Goldstein, Hovey and working Crew for about a minute. Tr. 359:2-7, 412:22. Further, Hovey testified that he and Goldstein were in the grocery aisle for two to three minutes. Tr. 126:24-25.

Finally, the Regional Director should take into consideration the fact that Goldstein, as counsel for Trader Joe's United on the third and fourth days of hearing, was not sequestered and

likely reviewed in some capacity the transcripts of prior witness testimony, as he made references to the record from the first day of hearing in which he was absent. *See, generally, Tile Contractors Assn.*, 287 NLRB 769, 779 fn. 49 (1987) (witness' failure to sequester taken as a factor when assessing credibility).

B. Connor Hovey Is Trader Joe's United and All His Objectionable Conduct Engaged in During the Campaign is Imputable to the Union

1. Trader Joe's United is a Crew Member-Created Union and is Made Up of Solely the Crew Members Leading the Organizing Efforts

Trader Joe's United was created in early 2022 as a result of an organizing drive amongst Crew at the Trader Joe's store in Hadley, Massachusetts.[5] Crew at a Trader Joe's store in Minneapolis, Minnesota and Louisville, Kentucky (the store at issue here) organized under Trader Joe's United, which was the petitioner here and appeared on the ballot. Contrary to the more "traditional" unions, such as the CWA or Teamsters, Trader Joe's United does not have established officers or business agents responsible for running campaigns and handling election logistics. *See* Tr. 116:19-117:8. Rather, Trader Joe's United claims to be made up of the Crew organizing at each store. Trader Joe's United prides itself on being "an independent labor union" that is "worker-powered." *See* GoFundMe, "Trader Joe's United Solidarity Fund." Indeed, speaking from the perspective of fellow Crew, Trader Joe's United is described as "we literally are the union." *Id*.

Because the Union must act through someone and because the Crew and the Union are one in the same, the Regional Director should conclude that Hovey acted as either a *de facto*

[5] The history of Trader Joe's United is detailed on the "Trader Joe's United Solidarity Fund" GoFundMe page, which solicits monetary donations to support the Union's organizing efforts. *See* https://www.gofundme.com/f/trader-joes-united-solidarity-fund (last accessed Apr. 7, 2023). This GoFundMe page has been publicly advertised by the Union and the Union's counsel Goldstein on their respective public Twitter pages. *See, e.g.,* @TraderJoesUnite, https://twitter.com/TraderJoesUnite/status/1638899863990534144 (Mar. 23, 2023). The Employer asks that the Regional Director take judicial notice of this Trader Joe's United page and the information contained therein.

representative of the Union or as its agent. Trader Joe's United does not have an office, either nationally or locally in Louisville. Tr. 116:14-18. No other Trader Joe's United officers were present at the Louisville Store throughout the campaign to drive the Union's efforts or garner support. Tr. 120:12-13. Instead, Hovey was the face and leader of the Union and its organizing efforts at the Store. Tr. 161:22-25. Hovey, alone, presented the representation petition to Wood on behalf of the Union. Tr. 129:22-130:5. Crew understood Hovey to be the leader or head of the Union's efforts, primarily because Hovey initially communicated with Crew that they were thinking of forming a union. Tr. 195:1-15, 237:16-25, 361:1-6. Throughout the campaign, Hovey sent texts to Crew to publicize the various union-related events. Tr. 130:17-18. Only Goldstein and Hovey attended the pre-election conference on the day of voting and no other officer of the Union was present. Tr. 120:17-23. Finally, during the critical period before the election, Hovey alone was asked by the Union if he would attend the collective-bargaining sessions on behalf of the Louisville Store if the Union received the majority of the votes. Tr. 136:11-23. Hovey did indeed attend three Union bargaining sessions for the Hadley and Minneapolis Trader Joe's stores as a Crew Member from the Louisville Store, and the United Food and Commercial Workers union paid for his expenses to do so. Tr. 142:4.

Hovey was not merely an organizer handing out Union flyers alongside Union representatives or business agents. Hovey *is* the Union. Following in the footsteps of the two unionized Trader Joe's stores, Hovey is "Trader Joe's United" at the Louisville store and acted as a representative of the Union on behalf of his Louisville colleagues. This association cannot be ignored. For the above reasons, the Regional Director should find that Hovey is a *de facto* representative of the Union, and therefore all his conduct during the critical period of the election is imputable to the Union.

2. Alternatively, Hovey Was an Agent of the Union When He Engaged in Objectionable Conduct

If the Regional Director declines to find that Hovey is a Union representative in these circumstances, his conduct is still chargeable to the Union because the Employer has established that he was an agent of the Union. The Board applies agency principles when determining whether a lead organizing employee is an agent of a union during an organizing campaign. *See Corner Furniture Discount Ctr., Inc.*, 339 NLRB 1122 (2003). Once an agency relationship is established, the Board evaluates the individual's conduct during the campaign by applying an objective standard. Under this standard, conduct is objectionable if it has "the tendency to interfere with the employees' freedom of choice." *Cedars-Sinai Med. Ctr.*, 342 NLRB 596, 597 (2004) (citing *Cambridge Tool & Mfg. Co.*, 316 NLRB 716, 716 (1995)). As demonstrated below, Hovey was an agent of the Union and his intimidating and threatening conduct interfered with Crew Members' free choice in the election.

The evidence established that Hovey had apparent authority to act on the Union's behalf. "Apparent authority . . . results from a manifestation by a principal to a third party that another is his agent." *Communications Workers Local 9431 (Pacific Bell)*, 304 NLRB 446, 446 fn. 4 (1991). The Board applies a totality of circumstances analysis in determining whether "a reasonable basis [exists] for a third person to believe that the purported agent was authorized to act on behalf of the principal." *Bellagio, LLC*, 359 NLRB 1116, 1117 (2013); *see Great American Products*, 312 NLRB 962, 963 (1993) ("[E]ither the principal must intend to cause the third person to believe that the agent is authorized to act for him, or the principal should realize that this conduct is likely to create such belief.").

Trader Joe's United should realize that based on the circumstances surrounding the campaign and election day, Crew at the Louisville Store believed Hovey was authorized to act on

the Union's behalf. Hovey, at the direction of Union officer Yosef, initiated contact with Crew about forming a union. As stated above, Hovey alone approached Wood to attempt the present the petition, the Union asked Hovey during the critical period if he would attend collective bargaining on behalf of the Louisville Store, and only Hovey accompanied Goldstein to the pre-election conference on behalf of the Union.[6] These circumstances demonstrate that Hovey acted as an agent of Trader Joe's United and the Regional Director should find the same.[7]

C. The Union Engaged in Objectionable Conduct That Interfered with the Laboratory Conditions Necessary for a Free and Fair Election

1. The Objective Standard for Assessing Objectionable Conduct Turns on Whether the Conduct Has a Reasonable Tendency to Coerce Employees, And the Fact That Employees Voted is Irrelevant to the Analysis

The Board may find conduct objectionable under two standards: conduct engaged in by a party to the election or third-party conduct. Under either standard, the Board conducts an objective analysis. When analyzing party conduct, "the issue is not whether [a party's] statement or conduct in fact coerced the employees but whether it has a reasonable tendency to do so." *Pearson Education, Inc.*, 336 NLRB 979, 983 (2001), citing *Amalgamated Clothing Workers v. NLRB*, 441 F.2d 1027, 1031 (D.C. Cir. 1970) (discussing that an objective standard does not consider "whether an employee actually felt intimidated but whether the employer engaged in conduct which may reasonably be said to tend to interfere with the free exercise of employee rights"); *Cambridge Tool & Mfg. Co.*, 316 NLRB at 1263 fn. 4 (finding that the Hearing Officer improperly relied on evidence that the threats did not alter the employee's behavior because

[6] Additionally, when the Union publicly announced the organizing campaign at the Louisville Store, Hovey was the only Crew Member featured in a "More Perfect Union" video on why sought to unionize. *See* @MorePerfectUS, https://twitter.com/MorePerfectUS/status/1605280624822173697 (Dec. 20, 2022) (last accessed Apr. 7, 2023).

[7] As General Counsel and representative of Trader Joe's United (Tr. 279:4-7), Goldstein is similarly and agent of the Union.

"[t]he fact that a threat does not produce the desired result does not mean that there was no threat.").

Similarly, "[t]he Board will set aside an election based on third party conduct only if such conduct viewed on an objective rather than subjective basis creates a general atmosphere of fear of reprisal rendering a free election impossible." *Volkswagen Group of America, Inc.*, 10-RC-121704 (Mar. 17, 2014). Specifically, the Board considers the following five factors when assessing third party conduct:

> whether the threat encompassed the entire bargaining unit; whether reports of the threat were disseminated widely within the unit; whether the person making the threat was capable of carrying it out, and whether it is likely that the employees acted in fear of his capability of carrying out the threat; and whether the threat was 'rejuvenated' at or near the time of the election.

Westwood Horizons Hotel, 270 NLRB 802, 803 (1984). As with the party conduct standard, the Board does not look into whether the impacted employees did act in fear of the objectionable conduct.

Based on the above standards, the Regional Director should find that Hearing Officer Moore improperly overruled the Employer's objection to the Union's counsel's line of questioning as to whether certain Crew voted in the election. *See* Tr. 152:2-153:24. Whether conduct was objectionable – either under the party or third-party conduct standard – does not turn on whether employees voted. Employees may still vote in the election and feel coerced in their choice, in the same way that they may choose not to vote. As the Employer indicated on the record, if objectionable conduct occurs, and employees nevertheless vote, this does not vitiate the objectionable conduct and Board precedent recognizes such. Tr. 153:25-154:3. Accordingly, the Employer requests that the Regional Director give no weight to the irrelevant testimony elicited by Union's counsel on whether or not Crew voted.

2. The Union Interfered with Employee Free Choice Through Threatening Statements to Eligible Voters

The threats by both agents of the Union and non-agent Union supporters during the critical period interfered with Crew Members' free and uninhibited choice in the election. *See Smithers Tire*, 305 NLRB 72, 72-73 (1992) (separate threats by two employees and an employee held to be agent of the union would be reasonably interpreted by an employee as a threat and sufficient to set aside the election).

From the beginning of the campaign, the Trader Shift Facebook page in which most Crew at the Louisville Store were members became a forum for hostile interactions about unionization.[8] After Knights merely expressed her viewpoint and personal experience with unions on the Facebook group in the days leading up to the election, Gillenwater publicly posted that Knights' opinion was "dangerous." Tr. 229:9-21, 232:1-5; Er. Ex. 5. This statement was perceived as a threat not only by Knights, but by the other ten Crew who approached Knights to ask if she was okay after receiving Gillenwater's comment. Tr. 233:25-234:2, 250:5-16. Indeed, Knights was so shaken by Gillenwater's post that Knights requested to change her schedule so that she did not leave the Store at the end of the night with pro-Union Crew and she, along with other Crew, used the buddy system when leaving the Store at night. Tr. 234:8-18. Further, Knights credibly testified that she believed Gillenwater could carry out the threat by possibly doing harm to her personally, her family, her property or harm anyone else that did not support the Union. Tr. 232:7-9. *See PPG Industries, Inc.*, 350 NLRB 225, 226 (2007) (union agent's threat addressed to specific employee, objectionable, because employees would reasonably

[8] Because a majority of Crew Members at the Store were members of the Facebook group, the Regional Director should conclude that any statements on the page were sufficiently disseminated for purposes of the objectionable conduct analysis. *See Community Action Commission of Fayette County, Inc.*, 338 NLRB 664, 666-67 (2002) (threat to employee of job loss if the Union was brought in objectionable and set aside election where employee repeated employer's threat at a union meeting).

believe they would face similarly consequences if they crossed the picket line). The Regional Director should conclude that this threat was so aggravated as to create a general atmosphere of fear and reprisal (and in fact did) rendering a free election impossible on January 25 and 26.

Similarly, the threatening texts and exclamations by Hovey and Goldstein directed towards Verrill during the critical period of the election was so coercive that they interfered with the laboratory conditions necessary to conduct a free and fair election. Unprovoked, and just days before the election, Hovey sent an aggressive and lengthy text message to Verrill that made her "feel really afraid and kind of scared if [she] didn't vote for the union." Tr. 188:7-11; Er. Ex. 2. Hovey even went as far to tell Verrill that her position on unionization "put a very strong majority of peoples' jobs in jeopardy." Er. Ex. 2; Tr. 190:6-191:3. Threatening statements tied to job security frequently constitute objectionable conduct under the Act. *See, e.g., Jennmar Corp. of Utah, Inc.*, 301 NLRB 623, 635 (1991) (statement containing a threat that "suggests jobs may be in jeopardy" because of the union campaign, objectionable). Verrill shared Hovey's threatening statements with other eligible voters, further impacting the coercive nature of the text message on the Crew. Tr. 191:4-9.

The interaction between Goldstein and Verrill on the morning of the election would also reasonably coerce Crew and their free choice in the election. Verrill was on the clock, assisting a customer and unable to leave her post, when Goldstein shouted "Solidarity" at her. Er. Ex. 4; Tr. 170:13-16. When Verrill responded that she was not with the Union, Goldstein replied "Oh, you're one of those." *Id*. A reasonable Crew Member would feel threatened by the statement and also that their union sentiments have and could continue to have a negative impact on their position at work, as Verrill testified she in fact felt. Tr. 187:15-21. Further, Goldstein shouted

"Solidarity" loud enough for Verrill's coworker, the customer Verrill was assisting, and anyone else in the wine shop at the time to hear. Tr. 171:14-172:11.

3. The Union Utilized Irrelevant, Inflammatory Racial Appeals During the Campaign

The Board has held that racial appeals constitute objectionable conduct where "the appeals or arguments can have no purpose except to inflame the racial feelings of voters in the election." *Bancroft Mfg. Co.*, 210 NLRB 1007, 1008 (1974). The standard for analyzing racial appeal statements is set forth in *Sewell Mfg. Co.*:

> So long . . . as a party limits itself to truthfully setting forth another party's position on matters of racial interest and does not deliberately seek to overstress and exacerbate racial feelings by irrelevant inflammatory appeals, we shall not set aside an election on this ground. However, the burden will be on the party making a racial message to establish that it was truthful and germane, and where there is doubt as to whether the total conduct of such party is within the described bounds, the doubt will be resolved against him.

138 NLRB 66, 71-72 (1962).

The Union and its supporters utilized racial appeals throughout the campaign to garner support amongst Crew. Captain Wood made two prior staffing decisions that the Union relied upon to paint Wood as racist. Tr. 73:19-21, 75:13-22. At the start of the campaign, Mate Vondran found graffiti on Employer-owned equipment that read "Racist Mates and Captain." Tr. 487:15-18. Within a week before the election, Union organizer Gillenwater stated that the Captain was "white and racist and a republican and Christian." Tr. 192:8-18, 208:15-17. None of these instances involved "relevant campaign statement[s]" that "truthfully set[] forth another party's position on matters of racial interest" but, rather, amount to no more than inflammatory racial appeals with no basis in fact. *Id*. at 71. Further, the Union has not met its burden to establish any of the above statements are truthful and germane as the Employer's witnesses' testimonies were unrebutted by the Union and otherwise unaddressed.

During the hearing, Union's counsel repeatedly objected to the Employer's questioning of its witnesses about the prevalent racial appeals during the critical period. In overruling the objections, Hearing Officer Moore noted that she would give the evidence and testimony "the weight that is appropriate after hearing all [the] testimony." Tr. 74:1-75:8. The Regional Director should give full weight to the testimony and evidence on this issue. This misconduct, inflammatory racial appeals, is relevant to determining whether the Union's and pro-Union Crew Members' conduct was so severe as to interfere with Crew free choice or created a general atmosphere of fear and reprisal that rendered a free election impossible. Further, the testimony on this issue was hindered by Hearing Officer Moore's order that the Employer ask narrow questions solely to establish the foundation of the photograph depicting the "Racist Mates and Captain" graffiti. Tr. 477:7-11; Er. Ex. 3. Thus, testimony on this issue was hindered and had the Employer been able to fully explore this issue the record would reflect the extent to which this inflammatory messaging was disseminated. Tr. 488:18-23. The overall evidence indicates that the Union and its supporters improperly used racial appeals to advance their organizing efforts, and the Regional Director should conclude that this amounts to objectionable conduct sufficient to impact the atmosphere of the election.

4. The Union Improperly Addressed Groups of Eligible Voters on the Clock Within 24-Hour Period Prior to the Election

The Regional Director should find that the Union, through Hovey and Goldstein, engaged in objectionable conduct by addressing groups of Crew about the Union within the 24-hour period prior to the election. For over 70 years, the Board has prohibited speeches to "massed assemblies of employees within 24 hours before the scheduled time for conducting an election." *Peerless Plywood*, 107 NLRB 427, 429 (1953). This prohibition applies equally to both "employers and unions alike." *Id*.

Recently, General Counsel Jennifer Abruzzo detailed her intention to expand this rule in the unfair labor practice context and find unlawful speeches to employees when "convened on paid time" or "cornered while performing job duties." *See* GC Memorandum 22-04, *The Right to Refrain from Captive Audience and Other Mandatory Meetings* (April 7, 2022). The General Counsel's basis for her instruction is that in order to avoid such speech, employees would need to abandon their assigned work duties to avoid the speech directed at them—a choice which could result in discipline. *Id.*; *see also* Brief in Support of Counsel for the General Counsel's Cross-Exceptions to the Administrative Law Judge, Case Nos. 14-CA-290968 et al., at 25 (Nov. 23, 2022) ("the Act's protection for an employee's choice to receive a message concerning Section 7 activity parallels the protection for the employee who imparts the message.").

These principles apply in the objections context under both *Peerless Plywood* and the related concept of "cornering." In *Honeywell Inc.*, the Board sustained an objection that the employer violated the *Peerless Plywood* rule for addressing eligible voters, while they were at work, with union-related speech on the day of the election. 162 NLRB 323, 324-25 (1966). In so holding, the Board noted that "the *Peerless Plywood* ban is not limited to 'a formal speech in the usual sense,' but is designed to bar 'absolutely' during the 24-hour preelection period . . . campaign speech in any form, including specifically campaign electioneering . . . ." *Id*. at 325. Further, the Board held that a violation of the *Peerless Plywood* ban occurs even if only "a single section" of the employees are involved:

> It has long been settled that the term 'massed assemblies,' as used in the statement of the *Peerless Plywood* rule, is not to be construed as 'limited to all or most of the unit employees, or to any certain percentage of them, or to an assemblage of such employees whose votes would be [sufficient in number] to affect the outcome of the election.'

Id.

On the morning of January 25, 2023, Hovey and Goldstein entered the grocery store and approached Crew assigned to the product team and at work stocking shelves. Er. Ex. 6. Wrucke first observed the pair for approximately a minute talking to a group of Crew before she reported the interaction to Campbell. Tr. 358:18-22. After receiving Wrucke's concerned report, Campbell walked out and separately observed a group of about four Crew gathered around Hovey and Goldstein in the grocery aisle of the Store. Tr. 393:6-17. Campbell's contemporaneous statement was fully consistent with her testimony and detailed that the pair was "surround by at least 4 [Crew Members] talking" and that "the [Crew Members] on the Grocery Aisle were on the clock and had been tasked with working that section[.]" Er. Ex. 6. During the hearing, Hovey acknowledged that him and Goldstein spoke to the Crew about union matters and were talking about "the upcoming vote." Tr. 150:13-20.

Thus, not only were Hovey and Goldstein addressing a group of at least four Crew within the 24 hours prior to voting, they did so while the Crew were on the clock, assigned product team tasks, ***and unable to walk away***. Crew would have no choice but to listen to Hovey and Goldstein's remarks about the Union or risk discipline by abandoning their post and job duties. This is precisely the type of situation the General Counsel believes is inconsistent with Section 7 of the NLRA. For these reasons, the Regional Director should sustain this objection.

IV. CONCLUSION

For all the foregoing reasons, the Employer requests that the Regional Director sustain the objections finding that the Union engaged in objectionable conduct sufficient to render a free election impossible and order a second election.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing Post-Hearing Brief of Employer Trader Joe's East Inc. was E-filed on April 7, 2023, and served via electronic mail on the same date, upon the following:

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